

July 3, 2001

PUBLIC UTILITIES COMMISSION
Re: Proposed Rulemaking to
Amend Chapter 91

ORDER COMMENCING
RULEMAKING

WELCH, Chairman; DIAMOND and NUGENT, Commissioners

I. SUMMARY

The Commission is instituting this rulemaking to amend certain provisions of Chapter 91¹ of the Commission's Rules (65-407 CMR 91), Safety of Overhead Utility Lines Crossing Water and Adjacent Areas Suitable for Rigging, Launching, and Operating Boats. This rule establishes safety requirements for overhead utility lines crossing areas of water and adjacent rigging or launching areas where boats may come into contact with overhead lines.

II. BACKGROUND

We originally adopted Chapter 91 in 1988 under our general statutory authority to ensure safe, reliable facilities and service found in 35-A M.R.S.A. § 301. The Rule established standards for utility lines crossing navigable bodies of water and rigging or launching areas by incorporating the requirements of the National Electric Safety Code (NESC or the Code) with some modifications. In some instances, the Rule requires greater safety measures than the NESC. Subsequently, in 1995, the Legislature statutorily required utilities and cable television companies to operate and maintain all of their lines in conformance with the NESC. 35-A M.R.S.A. § 2305-A. Under the statute, the Commission may modify, delete and waive requirements of the NESC (35-A M.R.S.A. § 2305-A(4)) and may impose additional safety measures. 35-A M.R.S.A. § 2305-A(5).² Any additional safety measures remain in effect for 10 years unless

¹ This Chapter is currently numbered 91. We propose changing this number from 91 to 910 to conform to the Public Utilities Commission's current practice of providing each rule a three-digit number. References to Chapter 91 in this order refer to our existing rule.

² We read 35-A M.R.S.A. § 2305-A(4), Modifications, Deletions and Waivers to Standard, to describe instances when the Commission allows variances to the Code standards which provide equivalent or lesser levels of safety than the Code provides. Likewise, we read 35-A M.R.S.A. § 2305-A(5), Additional Safety Measures, to describe instances when the Commission creates variances to the Code standards which provide

repealed or reaffirmed within 10 years. Modifications, deletions or waivers remain in force until the next edition of the NESC is published and adopted by the Commission, or the changes are repealed by the Commission, whichever occurs first. The Commission must reaffirm the changes, or they will expire when the new Code goes into effect.

A new edition of the Code was published in 1997. By operation of law (35-A M.R.S.A. § 2305-A (3)(B)), the Code was deemed adopted by the Commission. However, due to oversight, the Commission never reaffirmed the modifications and additions to the Code contained in Chapter 91.

Through this rulemaking we intend to readopt and update the additional safety measures to the Code contained in our original Chapter 91 in compliance with 35-A M.R.S.A. 2305-A(5). Sections 1(A), 3(A), 3(B) and 3(C) contain additional measures. Once adopted, the additional safety measures will remain in effect unless we repeal the requirements or decide not to reaffirm the requirements within 10 years of their effective date.³

III. HISTORY OF CHAPTER 91

When the Commission adopted Chapter 91 in 1988, there was no requirement, either in statute or the Commission's rules, that existing overhead lines comply with the water crossing requirements of the National Electric Safety Code. At that time, the Commission was concerned about the danger presented by existing overhead electric and telephone utility lines. Chapter 32, Section II(A)(2) of the Commission's Rules provided that all new construction, reconstructions, maintenance and operation of electric plants comply with the most recent requirements of the National Electric Safety Code; however, the application of Code standards to existing electric and telephone lines was not addressed. Partly in response to the 1975 electrocution of Phillip Cobb, who died when the 26-foot mast of his Hobie Cat came in contact with an overhead line, the Commission sought to apply the Code requirements to existing overhead lines with some specific modifications. *See generally, Maine Public Utilities Commission, Order Adopting Rule and Statement of Factual and Policy Basis*, Docket No. 88-97. (July 19, 1988) Although 35-A M.R.S.A. § 2305(2) now requires that all transmission and

greater levels of safety than the Code provides. The proposed Rule contains only "Additional Safety Measures."

³ We note that the 2002 Edition of the Code is scheduled for publication in August 2001. If no hearing is requested within 120 days of publication of the new Code, the Code will be deemed adopted pursuant to 35-A M.R.S.A § 2305-A(3)(B). Having obtained an advance copy of Section 23, the portion of the Code relating to this Rule, we recognize that the 2002 Edition contains some revisions to Table 232-1 and the applicable footnotes. None of these revisions appear to substantively effect the provisions of our proposed Chapter 910. Because the new Code will not become effective until January 2002, at the earliest, we amend and reaffirm Chapter 91 with reference to the 1997 Code.

distribution utilities, telephone utilities and cable television companies comply with the most current standards of the Code, we believe that the Chapter 91 modifications, providing additional safety measures, remain necessary.

Chapter 91 incorporated all the requirements of Sections 7 and 8 of Table 232-1 of the 1987 Code, including all applicable footnotes, with at least four modifications. Section 7 sets forth the vertical clearance requirements for wires, conductors and cables crossing over water areas suitable for sailing. Section 8 sets forth the vertical clearance requirements for lines crossing over public or private land and water areas posted for rigging and launching sailboats. The most significant departure from the Code requirements in Chapter 91 was the elimination of Section 7(b) from Table 232-1, which effectively created an additional safety measure.

Section 7 of Table 232-1, describing height requirements for lines crossing water bodies suitable for sailing, is divided into four categories: water areas with an unobstructed surface area of less than 20 acres, areas of 20 to 200 acres, areas of 200 to 2,000 acres and areas of greater than 2,000 acres. Different height requirements apply to each of the four categories. The Commission determined that Section 7(b), 20 to 200 acres, should be eliminated and that the higher height requirements of Section 7(c) (32 feet to 35 feet) should also apply to water areas of 20 to 200 acres. This determination was based on findings that sailboats with masts exceeding 29 feet were being used on water areas of 20 to 200 acres with accidents resulting.⁴ The 1997 Edition of the Code (currently in effect) maintains the distinction between each of the four categories of water areas, making the elimination of Section 7(b) still necessary to give effect to the original purpose of the Rule.

Through Chapter 91, the Commission also made the requirements of Section 8 of Table 232-1 applicable to existing overhead lines. Section 8, describing the vertical height requirements for overhead lines crossing public or private land and water areas posted for rigging or launching sailboats, simply requires that clearance for those areas should be five feet greater than in Section 7. Although the 1988 *Order Adopting Rule* and Chapter 91 do not explicitly address the elimination of category 7(b) in reference to Section 8, by its own terms Section 8 relies on Section 7. Moreover, it is apparent from the discussion in the *Order Adopting Rule* that the Commission intended to eliminate the 20 to 200 acre category for the purposes of Section 8 as well as Section 7. The Commission did explicitly eliminate the 20 to 200 acre category of Footnote 18 to Table 232-1, indicating a desire to remove the category throughout the portion of the Code incorporated by the Rule.

⁴ These findings were made by representatives of four New England electric utilities who recommended increasing vertical height requirements of lines crossing 20 to 200 acre bodies of water and were contained in the *Preprint Proposals for Revision of the 1987 Edition of the Code for the 1990 Edition* (Institute of Electrical and Electronics Engineers, Inc. New York, NY, April 15, 1988). The Code Subcommittee ultimately rejected the proposal based on insufficient data. Docket No. 88-97, *Order* at 3.

Significantly, the Commission also provided a broader definition of “areas posted for rigging or launching sailboats” in Chapter 91 than the definition provided by the 1987 Edition of the Code. Basing its definition on a definition formerly permitted by the 1984 Edition of the Code, the Commission clarified that “posting” in Chapter 91 would mean “posting by signs, launching ramps, or other special facilities or land improvements or use which indicates that the area is intended for such use” rather than by signs only. Docket No. 88-97, *Order* at 6. The 1997 Edition of the Code is silent on the definition of “areas posted for rigging and launching sailboats.” Maintaining the broader definition originally provided in Chapter 91 does impose an additional safety measure beyond what the current Code requires.

Recognizing the burden heightened requirements placed on some utilities, the Commission provided a time-limited exception for lower voltage lines. The Commission allowed telephone utilities to maintain existing communication conductors and cables on existing poles, and electric utilities to maintain existing neutral conductors that met the requirements of Rule 230 E(1) of the 1987 Code until the poles were replaced, removed or reconstructed at which time the lines should have met the requirements of the Rule. The Commission found that these lines presented a lower risk and were therefore a lower priority. Docket No. 88-97, *Order* at 4.

Also in consideration of that burden, the Commission provided a two-year grace period for compliance with the Rule. Utilities were required to promptly file a list of non-complying lines and a plan to bring them into compliance before the two-year deadline expired on July 1, 1990. Lines that crossed land areas posted for rigging or launching boats that did not comply with the Rule were required to either be wrapped in protective coverings or marked with warning devices until the lines were raised. As described below, these grandfathering provisions are no longer necessary.

Chapter 91 also specifically modified the Code in reference to Footnote 19 to Table 232-1. Footnote 19 to Table 232-1, provided and currently provides, that “where the US Army Corps of Engineers, or the state, or surrogate thereof has issued a crossing permit, clearances of that permit shall govern.” *National Electric Safety Code*, Footnote 19 to Table 232-1 at 79 (CS-1997). The Commission took the opposite approach, and provided in Chapter 91 that “the requirements of Chapter 91 shall supersede any requirements for less vertical clearance allowed by the State of Maine, or a surrogate thereof, or the U.S. Army Corps of Engineers, to the extent allowed by law.” Chapter 91, § II(a)(iv).

III. DISCUSSION OF INDIVIDUAL SECTIONS

A. General Principles

In revising Chapter 91, we propose to maintain the original purpose of the rule, establishing appropriate safety requirements for overhead utility lines, while updating the rule to conform to current definitions and standards. Generally, Chapter 91 is revised to eliminate all requirements rendered unnecessary by the expiration of the

July 1, 1990 deadline and update the rule where appropriate to conform to current standards and definitions. The Commission also proposes that Chapter 91 be made applicable to cable television companies, as these entities are now subject to 35-A M.R.S.A. § 2305-A. All sections are renumbered for easier reading and reference and for consistency with other Commission rules.

B. Section I: Definitions

We propose revisions to both the terms selected for definition and the definitions provided in several instances.

1. Section 1(A): Areas Posted for Rigging or Launching Sailboats

We propose no changes to the definition of “areas posted for rigging or launching sailboats” since the Commission originally intended to provide a broad definition of this term and the 1997 Edition of the Code provides no explicit definition.

2. Section 1(B): Aerial Utility

We propose adding the term “aerial utility” and defining it to include distribution and transmission utilities, telephone utilities and cable television companies. The addition of this term allows these three entities to be referred to with one term throughout the Rule.

3. Section 1(C): Transmission and Distribution Utility

The term “electric utility” should be replaced with “transmission and distribution utility” to reflect the recent restructuring of the electric industry and for consistency with terms currently used in Title 35-A.

4. Section 1(D): Telephone Utility

We eliminate the reference to the definition of “radio common carriers” in Section I(A) of Chapter 24 of the Commission’s Rules as current Chapter 240 contains no Section I(A) or reference to radio common carriers. We also replace references to “cellular service providers” with “mobile telecommunications services” to reflect the terms currently in use and defined in Title 35-A and define it with reference to 35-A M.R.S.A. § 102(9-A).

5. Section 1(E): Cable Television Company

We define “cable television company” with reference to 30-A M.R.S.A. § 2001 as reflected in 35-A M.R.S.A. § 2305-A(1)(A).

6. Section 1(F): National Electric Safety Code

We replace “National Electric Safety Code, 1987 Edition” with “National Electric Safety Code” and expand the definition to include the 1997 Edition and any newer editions in effect pursuant to 35-A M.R.S.A. § 2305-A, which allows more current versions of the Code to automatically become effective unless contested. A statement indicating where copies of the incorporated provisions of the Code may be obtained is included in the definition of “National Electric Safety Code, 1997 Edition” to comply with the requirements of the Administrative Procedure Act, 5 M.R.S.A. § 8056.

7. Miscellaneous

We change references to “Technical Analysis” to “the Director of the Technical Analysis Division of the Commission” or “the Director” in order to refer to the Director and eliminate the definition of “Technical Analysis.”

The definition of “warning device” is no longer necessary as we propose eliminating Section III of Chapter 91. This section required the use of warning devices on lines crossing land areas posted for rigging and launching sailboats that did not immediately meet the requirements of the Rule. Because the July 11, 1990 deadline has expired, all lines that would have used warning devices as a substitute for immediate compliance should now be in compliance, rendering the term and all sections requiring warning devices unnecessary.

We replace the word “sailboating” with “sailing” throughout the Rule since “sailboating” is not a word recognized by Webster’s II New Riverside University Dictionary. (Webster’s II New Riverside University Dictionary, 1031 (1988).

C. Section 2: Purpose

We propose adding new Section 2, describing the purpose of the Rule. In addition, portions of current Section 3, Warning Devices, are incorporated into this section. This second change is discussed in more detail below.

D. Section 3: Vertical Clearance Requirements

Section 3, currently Section II of Chapter 91, is the operative provision of the Rule. Together with 35-A M.R.S.A. § 2305-A, Section 3 makes all the National Electric Safety Code vertical clearance requirements contained in Sections 7 and 8 of Table 232-1 applicable to overhead utility lines crossing water bodies and rigging or launching areas with the exception of the modifications outlined in the remainder of Section 3. We propose retaining the language from Section II in full with the exception of the July 1, 1990 deadline, which is struck as it is no longer relevant. Likewise, we propose eliminating Section II(b) entirely. This section sets forth a requirement that utilities file a list of non-compliant lines crossing water areas and rigging or launching

sites by September 1, 1988 and file a plan for full compliance by July 1, 1990. Since both these deadlines have long since passed, Section II(b) is no longer necessary.

1. § 3(A) – Water Areas of 20 to 2,000 Acres

We propose adding a new sub-heading, “Water Areas of 20 to 2,000 Acres” to emphasize that this section contains the major substantive addition the Rule makes to the Code and to identify the portions of Section 3 that relate to this category of water bodies. The three subsections in Section 3(A) all reflect modifications we make to Table 232-1 of the Code which create additional safety measures.

a. § 3(A)(1)

We propose revising current Section II(a)(i) of Chapter 91 to reflect current Code standards. Specifically, we replace “minimum clearance requirements of 32 feet to 35 feet” in Section II(a)(i) with “minimum clearance requirements of 31.5 feet to 34.5 feet” when describing the minimum clearance requirements of Section 7(c) of the Code. This will lower the vertical clearance requirements for water areas of 20 acres to 2,000 acres by six inches in most cases; however, this reflects the 1997 Code standards and is consistent with the Commission’s original intent to incorporate the clearance requirements of the Code, with limited exceptions.⁵ The fact that “minimum clearance requirements of 32 feet to 35 feet” appears in parentheses in the Rule indicates that this phrase was originally used to describe the requirements of Section 7(c) and was not used to independently establish a precise “32 feet to 35 feet requirement.” Section II(a)(i) is renumbered as Section 3(A)(1) in the revised rule.

b. § 3(A)(2)

We add a sentence clarifying that Section 7(b) of Table 232-1 is eliminated for the purposes of Section 8 of Table 232-1. This addition will be found in Section 3(A)(2).

c. § 3(A)(3)

Section II(a)(ii) of Chapter 91 eliminated the 20 to 200 acre category contained in footnote 18 of Table 232-1. Footnote 18 modifies the clearance requirements in places where over-water obstructions, such as bridges, restrict vessel height. The 1997 Edition of the Code changes footnote 18 slightly by referring the reader to new Table 232-3. We propose including a reference to Table 232-3 in order

⁵ The Commission noted in the order adopting Chapter 91 that “the Code is the result of extensive effort and review by experts from various fields and areas. As the utilities are accustomed to working with the complete Code, the Commission will, with certain exceptions, incorporate by reference the provisions of section 232 of the Code . . .” Docket No. 88-97, *Order* at 3.

to properly identify the current location of the 20 to 200 acre category (now (f)(2)) and renumbering this as Section 3(A)(3).

2. § 3(B) – Existing Communications and Neutral Conductors

Section II(a)(iii) provided a time limited exception for existing communications and neutral conductors. Existing communications and neutral conductors as described in this provision could be maintained at their present height until such time as the pole was replaced, removed or reconstructed. We propose retaining this Section as it is possible that some of these lines still exist awaiting replacement. We also propose adding cable television companies to this section. This will allow cable television companies to also maintain existing communication conductors and cables on existing poles until the pole is replaced, removed or reconstructed. This section will be renumbered as Section 3(B).

3. § 3(C) – Lesser Requirements Superseded

No changes are proposed to Section II(a)(iv), except that it should be renumbered as Section 3(C). In the interest of safety, the higher requirements of this Rule should continue to supersede any requirements of lesser vertical clearance allowed by the State or the U.S. Army Corps of Engineers, to the extent allowed by law.

E. Sections Eliminated

1. Section II(b) of Chapter 91

We propose eliminating Section II(b) (concerning non-compliant lines) of Chapter 91 as discussed above in III(D).

2. Section III of Chapter 91

We propose eliminating Section III almost entirely. Section III sets forth the requirement that warning markers or protective wrap be used on non-compliant lines crossing rigging or launching sites until the lines are brought into compliance. Because these lines were required to be in compliance by July 1, 1990, the allowance for the use of warning devices and protective wrap during the two-year grace period is no longer relevant. The Commission's order adopting Chapter 91 confirms that the warning device requirement was established only for this specific category of lines. The Commission stated, "Because the markings would not be in place beyond the two-year period set out for compliance with the vertical clearance requirements of this rule and provide less protection to the public than higher lines, the Commission will require the marking or insulating of non-complying lines only at areas for rigging or launching sailboats." Docket No. 88-97, *Order* at 7. Thus, the protective wrap and warning device requirement is irrelevant and Sections III(a), III(b) and III(d) should be eliminated.

We move the statement, found currently in Section III(c), that nothing in the rule should be interpreted to prohibit or discourage other actions to warn the public of the presence of overhead lines in these areas, to the “Purpose” section, Section 1, of the Rule.

3. Section IV of Chapter 91: Reports

We propose eliminating Section IV of current Chapter 91 entirely. Section IV requires a quarterly report describing the lines raised, reconstructed or removed to meet the requirements of the Rule, the cost of such work and the lines the utility plans to put into compliance during the current quarter. The quarterly reporting requirement set forth by the Rule was only necessary during the two-year grace period in order to track the utilities’ progress toward compliance. Since this period has expired, reporting is no longer necessary.

4. Section V of Chapter 91: Legal Effect

We propose eliminating Section V entirely. Section V describes the legal effect of the two-year grace period. Because this grace period has expired a description of the legal effect of the period is no longer necessary.

F. Section 4: Delegation of Authority

We propose retaining part of current Section VII, Delegation of Authority, under “Delegation of Authority” and moving part to create a new “Waiver or Exemption” section. Section VII will be renumbered Section 4. “Delegation of Authority” should retain the statement delegating authority to the Director of the Technical Analysis Division to determine whether a line at a particular location is regulated by Chapter 91 and complies with the rule. The delegation of this authority continues to be appropriate.

The sentences describing the Director’s ability to grant a waiver should be removed from the “Delegation of Authority” section. New Section 6, “Waiver or Exemption,” should be created using our current, standard waiver language. This change will provide waiver language consistent with the Commission’s other rules.

G. Section 5: Civil Violation for Failure to Comply

We propose retaining current Section VI, Civil Violation for Failure to Comply, and renumbering it as Section 5.

H. Commission Appeal

We propose eliminating current Section VIII. Currently, reconsideration of the Director’s decision may be requested under Section 1004 of the Commission’s Rules of Practice and Procedure (65-407 C.M.R. 110) within 20 days of the date of the

decision by filing a petition with the Commission stating the grounds for reconsideration, rendering Section VIII unnecessary.

I. Waiver or Exemption

As explained previously, we move the waiver provision from former Section VII, Delegation of Authority, to new Section 7 and update the provision with our current waiver language used in all of the Commission's rules.

IV. PROCEDURES FOR THIS RULEMAKING

This rulemaking will be conducted according to the procedures set forth in 5 M.R.S.A. § 8051-8064 and 35-A M.R.S.A. § 2305-A(4), (5). A public hearing is scheduled for Tuesday, August 7th, 2001 at 1:30p.m. in the Public Utilities Commission, Horace Libby Hearing Room, 242 State Street, Augusta, Maine. Written statements concerning the proposed amendments may be filed with the Commission within 10 days after the close of the hearing, August 17, 2001. Please refer to the Docket Number of this proceeding, Docket No. 2001-374, when submitting comments.

Please notify the Public Utilities Commission if special accommodations are needed in order to make the hearing accessible to you by calling 1-287-1396 or TTY 1-800-437-1220. Requests for reasonable accommodations must be received 48 hours before the scheduled event.

In accordance with 5 M.R.S.A. § 8057-A(1), the fiscal impact of the proposed amendments is expected to be minimal. The amendments are not expected to impose an economic burden on small businesses. A more precise understanding of the fiscal impact of the amendments should be possible once comments have been received. The Commission invites all interested parties to comment on the fiscal impact and all other implications of the proposed amendments.

A copy of this Order will be provided to the following:

1. All transmission and distribution utilities in the State;
2. All telephone utilities in the State;
3. All cable television companies in the State;
4. All people who have filed with the Commission within the past year a written request of Notice of Rulemaking;
5. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5); and

6. Executive Director of the Legislative Council, State House Station #-115,
Augusta, Maine 04333 (20 copies)

Accordingly, it is

ORDERED

1. That the Administrative Director send copies of this Order to all the persons listed above and compile a service list of these persons and any additional persons submitting written comments on the proposed amendments.
2. That the Administrative Director send a copy of the Order Commencing Rulemaking Amendments to the Secretary of State for publication in accordance with 5 M.R.S.A. § 8053.

Dated at Augusta, Maine, this 3rd day of July, 2001.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR:

Welch
Nugent
Diamond